

8-26-2013

Myers v. State Respondent's Brief Dckt. 40259

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**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

David B. Myers appeals from the denial of his petition for post-conviction relief after an evidentiary hearing.

Statement of the Facts and Course of the Proceedings

Myers pled guilty to possession of a firearm by a felon. (R., p. 103.) He filed a petition for post-conviction relief asserting several claims, including a claim that his trial counsel was ineffective for failing to file a timely motion to suppress evidence. (R., pp. 3-10.) The district court granted his motion for appointment of counsel, and appointed counsel filed an amended petition. (R., pp. 11-14, 20-21, 38-45.) The matter proceeded to evidentiary hearing. (R., pp. 80-82.) The district court denied the petition, concluding that a timely-filed motion for suppression would have been denied on the merits. (R., pp. 103-12.) Myers filed a timely notice of appeal. (R., pp. 114-16.) Although the district court appointed counsel to represent Myers on appeal (R., p. 119), appellate counsel's motion to withdraw was granted (Motion for Leave to Withdraw (filed on or about 2/13/13); Order Granting Motion for Leave to Withdraw (entered 3/11/13)).

ISSUE

Has Myers failed to demonstrate error in the district court's determination that his counsel was not ineffective in failing to file a timely motion to suppress because such a motion would not have been granted?

ARGUMENT

Myers Has Failed To Show Error In The District Court's Factual Findings, And Therefore Has Shown No Error In The District Court's Denial Of His Petition For Post-Conviction Relief

A. Introduction

The district court concluded that the following factual findings would have been made upon Myers' motion for suppression of evidence:

On January 21, 2010 Caldwell Police Officer Brockbank made a routine traffic stop and spoke to a woman he identified as "Komp." Komp provided information to Brockbank about criminal activity at 201 ½ Blaine Street in Caldwell. Komp said she drove from Payette to that residence just a few minutes before being stopped by Brockbank, and dropped off two men at the residence. The two men told Komp they [were] going there to see "Dave" about trading some appliances for drugs. Additionally, a month earlier, Brockbank received information from other detectives that the same residence was being used for "fencing" stolen property. Brockbank had also checked a license plate of a car parked at the residence and found that it was registered to a woman with an outstanding felony warrant who was in fact later located on the property after Petitioner was arrested.

Brockbank, along with Officer Hoadley, went to the residence to investigate. The property had a home, and in the back yard there was a camp trailer. They first approached the trailer and knocked on the door. Petitioner opened the door. Brockbank told Petitioner that he was there to investigate possible criminal activity and asked if they could come in and talk about it. At that point, Petitioner stepped back and made a gesture with his arm allowing Brockbank into the trailer. The Court notes that Petitioner has at times denied this, but the Court finds that Petitioner's account is not credible. Petitioner's attorney concedes that Brockbank's initial entry was consensual.

Next, Brockbank asked Petitioner for identification and Petitioner removed his wallet and handed his identification to Brockbank, who then stepped out to radio the information to dispatch for a records check. The Court notes that Petitioner does not raise the issue of whether this was a reasonable investigative detention. When Brockbank stepped out, Officer Hoadley stepped into the threshold of the trailer to keep an eye on Petitioner.

Hoadley asked for permission to search the trailer, and Petitioner unequivocally refused, stating he knew his rights and did not have to let them search. Petitioner never at any time asked or told either officer to step out of the trailer or leave his property. Hoadley then made small talk with Petitioner while waiting for Brockbank to finish his discussion with dispatch. Hoadley had previous contacts with Petitioner and believed him to be a convicted felon. Hoadley noted that the interior of the trailer was cluttered with items and there was a small area in the back of the trailer behind a corner and some boxes that he could not see into, but appeared to be large enough to hide an individual. Hoadley asked if there was anyone else in the trailer and Petitioner said no. Hoadley asked if he could just walk to the back of the trailer to make sure no one was hiding there. At that point, although the evidence is conflicting, the Court finds that Petitioner affirmatively nodded to Hoadley, Petitioner stepped aside to allow Hoadley access, and Petitioner asked Hoadley to not scare the cat.

...

When Hoadley went to the back of the trailer, he saw a shotgun shell and the handgun in plain view. Shortly thereafter, [the officers] confirmed that Petitioner was a convicted felon who was prohibited from possessing handguns and arrested him for that crime.

(R., pp. 107-08.) Based on these facts, the district court concluded that "Petitioner gave voluntary consent" to Officer Hoadley to enter the trailer to confirm there were no other persons present. (R., p. 111.) Because Myers gave voluntary consent, the "motion to suppress would have been denied." (Id.) On this basis, the district court rejected Myers' claim of ineffective assistance of counsel.

On appeal Myers claims, but has failed to show, error by the district court. (Appellant's brief.)

B. Standard of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. Because The Suppression Motion Would Have Been Denied Regardless, Myers Failed To Prove Any Prejudice From The Failure To File A Timely Suppression Motion

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)).

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App.

1999). Where, as here, the allegedly deficient performance was failure to file a suppression motion, the petitioner has failed to prove prejudice if the motion would not have been granted. Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993); Davis v. State, 116 Idaho 401, 407, 775 P.2d 1243, 1249 (Ct. App. 1989).

The district court's conclusion that the suppression motion would not have been granted was correct. Consent is an exception to the warrant requirement and justifies entry into a home. State v. Johnson, 110 Idaho 516, 522, 716 P.2d 1288, 1294 (1986); State v. Staatz, 132 Idaho 693, 695, 978 P.2d 881, 883 (Ct. App. 1999); State v. Abeyta, 131 Idaho 704, 707, 963 P.2d 387, 390 (Ct. App. 1998). Consent is valid if it is free and voluntary. State v. Varie, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001). The voluntariness of an individual's consent is a question of fact to be determined based upon the totality of the circumstances. Id. at 848, 852, 26 P.3d at 35; see also Schneekloth v. Bustamonte, 412 U.S. 218, 225-226 (1973)). The district court's factual finding that Myers gave voluntary consent for Detective Hoadley to enter the home is dispositive of Myers' ineffective assistance of counsel claim because it disproves the prejudice element of that claim.

On appeal Myers asserts he in fact did not give voluntary consent. (Appellant's brief, pp. 2-3.) He has failed, however, to articulate or demonstrate how the evidence before the district court, once the trial court resolved conflicts in the evidence on the basis of credibility of the witnesses, did not support the district court's factual findings. Myers also argues that officers lacked probable

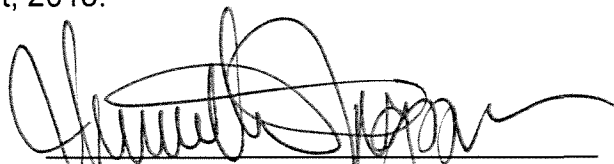
or other legal cause to enter the trailer to conduct a protective sweep. (Appellant's brief, p. 3.) However, because the district court concluded that the suppression motion would have been denied based on application of the consent exception, application of the protective sweep exception is rendered moot.

Myers failed to show a reasonable probability that but for counsel's failure to timely bring the suppression motion that the outcome of his criminal case would have been any different. The district court therefore properly denied his petition for post-conviction relief.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order and judgment denying Myers' petition for post-conviction relief.

DATED this 26th day of August, 2013.

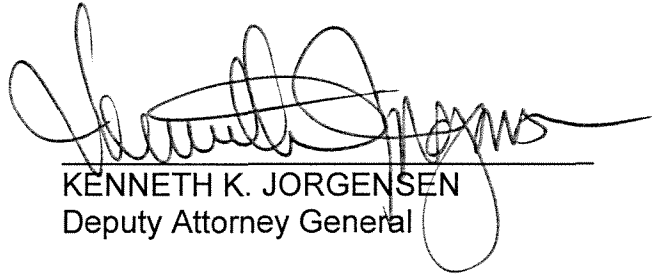


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of August, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DAVID B. MYERS
IDOC #14793
ISCI
PO Box 14
Boise, 83707



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/km